

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORR WATER DITCH CO., *et al.*,

Defendants.

Case No. 2:73-cv-00030-LDG

ORDER

In re: State Engineer Ruling #6126

The Schulers sought to change their water rights, as established under the Orr Ditch Decree. They petitioned the State Engineer for permission to change their point of diversion from Meadow Ditch to Big Ditch. After the State Engineer published notice of the petition, Big Ditch Water Co., manager of water rights flowing through Big Ditch, protested. Their reasons for protest included a conflict in water rights between those already flowing through the ditch and the Schulers' proposed change, a general detriment to public interest, and not having previously consented to the Schulers' proposed change. The State Engineer, relying on studies previously done on the ditch, determined that granting the petition for more water would not conflict with established rights, would not be detrimental

1 to the public interest, and would not ultimately wrest control from Big Ditch Water Co. Big
2 Ditch Water brought the instant petition for judicial review of the State Engineer's Ruling
3 #6126, and the State Engineer has filed a response.

4 **I. Background**

5 On December 23, 2009, the Schulers filed Application 79102 to change a point of
6 diversion provided by the Orr Ditch Decree. Approval of this application would condone a
7 change in the Schulers' point of diversion for Steamboat Creek water rights. Instead of
8 flowing through Meadow Ditch, the water would flow through Big Ditch. The Schulers
9 sought this change because, subsequent to attaining their water rights, third-party
10 development along Meadow Ditch prevented the Schulers from receiving their expected
11 water.

12 Beyond the application to the State Engineer, the Schulers also required legal
13 permission from the Big Ditch Water Co. to change their point of diversion. Big Ditch
14 Water Co. maintains the Big Ditch stream system and monitors the water rights passing
15 through the ditch. Big Ditch Water Co. asserts that it "had not consented to the delivery of
16 Meadow Ditch water rights through Big Ditch" and continues to oppose such action.

17 The State Engineer submitted the notice of application for publication in the Reno
18 Gazette Journal on January 21, 2010. The newspaper first published the notice on January
19 27, 2010. Three subsequent publications were made at weekly intervals as well.

20 On March 18, 2010, Big Ditch Water Co. filed a protest with the State Engineer,
21 "asking . . . to deny the application or, in the alternative, to hold a hearing." Big Ditch Water
22 Co. protested on three grounds: "(1) the proposed use would conflict with the existing rights
23 of Big Ditch water rights owners, (2) the proposed use threatens to prove detrimental to the
24 public interest, and (3) Big Ditch Water Co. has not consented and opposes the use of Big
25 Ditch to transport Meadow Ditch water." The State Engineer advised the Schulers of Big
26 Ditch Water Co.'s protest via certified mail on March 25, 2010.

1 On April 21, 2010, the State Engineer and various staff “investigated the Big Ditch
2 flow capacity.” The State Engineer found that Big Ditch could hold enough water to service
3 Application 79102. He also concluded that the office possessed sufficient information to
4 make a determination such that no administrative hearing was necessary. In so
5 concluding, the State Engineer also relied upon information collected during another study
6 of Big Ditch held on April 16, 2009.

7 On October 21, 2010, the State Engineer received a letter dated October 4, 2010,
8 from the Schulers responding to Big Ditch Water Co.’s protest. The Schulers encouraged
9 further findings by the State Engineer’s Office, and again requested approval of Application
10 79102.

11 On January 29, 2011, Big Ditch Water Co. received a letter from the State Engineer,
12 asking whether they still wanted to pursue their protest of Application 79102. In response,
13 on March 11, 2011, Big Ditch Water Co. informed the State Engineer that it “still intend[ed]
14 to pursue its protest.” Big Ditch Water Co. also again requested a hearing to “develop
15 evidence and testimony and to provide an adequate record for potential judicial review.”
16 On June 15, 2011, without first holding a hearing, the State Engineer overruled Big Ditch
17 Water Co.’s protest, and approved Application 79102 in Ruling 6126.

18 Big Ditch Water Co. now asks that the Court vacate Ruling 6126, and remand the
19 matter to the State Engineer with instructions to either 1) deny Application 79102, or 2)
20 hold a protest hearing on Application 79102, in compliance with both Nevada water law
21 statutes and State Engineer regulations. Big Ditch Water Co. argues that the State
22 Engineer failed to abide by timelines established by Nevada statute in the execution of his
23 duties as State Engineer, that the State Engineer abused his discretion by not holding a
24 protest hearing, and that the State Engineer denied Big Ditch Water Co. of due process.
25 The State Engineer argues that he complied with statutory timelines, that the granting of
26

1 protest hearings is purely discretionary, and that the sum of the Big Ditch Water Co.'s
2 claims does not amount to a denial of due process.

3 II. Analysis

4 This Court has proper jurisdiction over the instant case. This Court previously ruled
5 regarding this stream system in *United States v. Orr Water Ditch Co.*, No. A3 (D. Nev.
6 1944) (*Orr Ditch Decree*). Pursuant to Nev. Rev. Stat. § 533.450(1), this Court therefore
7 maintains jurisdiction over any case arising from dispute of the same stream system.

8 The State Engineer interprets and applies the water law within Nevada. *United*
9 *States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1308 (9th Cir. 1990). Nevada law gives him
10 the power to “determine the relative rights of. . . various claimants” regarding the use of
11 water. Nev. Rev. Stat. § 533.090(1), (2). When this Court addresses Nevada water law, it
12 defers to decisions rendered by the State Engineer, considering them “prima facie correct.”
13 Nev. Rev. Stat. § 533.450(10). However, “[i]t is [also] the duty of a reviewing court to
14 ensure that an agency follows its own procedural rules.” *Kelley v. Calio*, 831 F.2d 190, 191-
15 92 (9th Cir. 1987).

16
17 The Big Ditch Water Co. asserts that the State Engineer violated Nevada water
18 statutes and regulations, as evidenced by various procedural disputes. They claim the
19 State Engineer did not timely publish the Notice of Application in the Reno Gazette Journal
20 within 30 days, as per Nev. Rev. Stat. § 533.360(1). Nevada Revised Statute § 533.360(1)
21 requires that the State Engineer, “within 30 days [of initial filing], publish or cause to be
22 published once a week for 4 consecutive weeks . . . a notice of the application,” in a local
23 newspaper.

24 The Schulers initially filed Application 79102 on Dec. 23, 2009. The Reno Gazette
25 Journal published notice of the application on Jan. 27, 2010 – more than 30 days after the
26 initial filing. The State Engineer states that his office submitted the Notice of Application to

1 the newspaper on Jan. 21, 2010, within the 30-day statutory period. The State Engineer
2 claims that by sending the notice to the newspaper on Jan. 21, he “cause[d] to be
3 published” the requisite notice, even if it was not published by the newspaper within the
4 statutory time period. The State Engineer states that he has “no control over the
5 newspapers” within Nevada. The inability of a newspaper to publish within statutory
6 deadlines exceeds the scope of the State Engineer’s authority.

7 Here, the State Engineer concedes that the initial notice of application was not
8 published by the newspaper within 30 days of submission by the Schulers. However, he
9 has also shown that he did take action to publish the notice in mailing the application to the
10 Reno-Gazette Journal on Jan. 21, 2010, before the 30-day limit. Nevada law considers the
11 doctrine of substantial compliance when examining adherence to statutes and rules. *Leyva*
12 *v. Natl. Default Servicing Corp.*, 255 P.3d 1275, 1278 (Nev. 2011), *Rogers v. State*, 455
13 P.2d 172, 173 (Nev. 1969). The “court looks at the language used and policy and equity
14 considerations . . . to examine whether the purpose of the statute or rule can be adequately
15 served in a manner other than by technical compliance with the statutory or rule language.”
16 *Leyva*, 255 P.3d at 1278. “Where the purpose of the notice requirements is fulfilled, but not
17 necessarily in a manner technically compliant with all of the terms of the statute, [the
18 Nevada Supreme Court] has found such substantial compliance to satisfy the statute.” *Id.*
19 at 1278-79.

20 The Ninth Circuit acknowledges that substantial compliance doctrine can be
21 “problematic” in application when addressing deadlines, but has condoned such “when it
22 would not defeat the policies of the underlying statutory provisions.” *Christensen v. C.I.R.*,
23 142 F.3d 442 (9th Cir. 1998). Also, in deference to regulatory agencies, the Supreme Court
24 “would be most reluctant to conclude that every failure of an agency to observe [every]
25 procedural requirement voids subsequent agency action, especially when important public
26 rights are at stake.” *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

1 While the notice of application did not appear in the newspaper within 30 days of
2 submission, the State Engineer did act within that allotted time to cause publication and
3 comply with §533.360(1). After the State Engineer sent the application to the newspaper
4 for publication, he had little, if any, control over the final details of its publication. Further,
5 nothing in the record suggests that the State Engineer deviated from established
6 procedures in submitting the notice; no evidence demonstrates whether the State Engineer
7 submitted the notice of application later than usual, or whether other such notices have
8 been published outside of the 30-day window. The Court finds that this issue is insufficient
9 to warrant the relief requested by the Big Ditch Water Co., particularly when, as here, the
10 State Engineer substantially complied with statute by submitting notice for publication
11 during the 30-day period.

12
13 The Big Ditch Water Co. claims that the State Engineer untimely accepted the
14 Applicant's answer to Big Ditch Water Co.'s protest, in violation of Nev. Admin. Code §
15 533.140(1). After an application has been published, §533.365(1) states that "[a]ny person
16 interested may, within 30 days after the date of last publication of the notice of application,
17 file with the State Engineer a written protest against the granting of the application . . ."
18 Following the publication of the Notice of Application, Big Ditch Water Co. filed a protest
19 against granting the application on Mar. 18, 2010.

20 When a protest is received, §533.365(7) directs the State Engineer to follow Nevada
21 Administrative Code procedures. Pursuant to Nev. Admin. Code §533.140(1), "[a]n
22 applicant may, within 45 days after service of a notice of protest, file an answer to a protest
23 filed against his or her application." The Schulers responded on Oct. 21, 2010, past the
24 45-day limit imposed by Nev. Admin. Code § 533.140(1). The Big Ditch Water Co. claims
25 that the State Engineer's consideration of this tardy reply from the Schulers contributed to
26 an "abuse of discretion" in rendering any decision on Application 79102. The State

1 Engineer concedes that the Schulers filed an untimely response; however the response
2 “was not relied on by the State Engineer and is not cited anywhere in the ruling.”

3 In applying Nevada law, the Nevada Supreme Court has stated, “Administrative
4 agencies may receive and weigh evidence and a reviewing court may not substitute its
5 judgment on questions of fact . . . On questions of fact, this court is limited to determining
6 whether substantial evidence exists in the record to support the administrative agency's
7 decision.” *Clements v. Airport Auth. of Washoe County*, 896 P.2d 458, 461 (Nev. 1995).
8 Without substantial evidence to support its assertion that the State Engineer considered
9 the tardy reply, the Court will reject Big Ditch Water Co.’s argument and grant deference to
10 the State Engineer’s findings of fact and evaluation of evidence. While the Schulers
11 submitted an untimely response, the record does not support a conclusion that the State
12 Engineer relied upon, or even considered, that untimely response. Accordingly, the Court
13 finds that this issue is insufficient to warrant the relief requested by the Big Ditch Water Co.

14
15 The Big Ditch Water Co. also asserts that the State Engineer untimely issued a
16 decision on Application 79102 in violation of §533.370(2), as in effect from Jul. 1, 2009 to
17 June 9, 2011. The statute charges the State Engineer with rendering a decision on
18 applications “within 1 year after the final date for filing a protest.” *Id.* The State Engineer
19 issued Ruling 6126 in June 2011, approximately three months beyond the one-year limit.
20 However, the State Engineer counters that subsection 4 of the statute provides that “[i]f the
21 State Engineer does not act upon an application within 1 year after the final date for filing a
22 protest, the application remains active until acted upon by the State Engineer.” He
23 contends that any application not resolved within a year “remains active[,]” and therefore a
24 June 15, 2011 ruling does not violate §533.370(2).

25 Here, on first blush, the two subsections appear at odds in their requirements. One
26 mandates a ruling by the State Engineer within a year of the filing date, and the other

1 states that any filing remains active after that same year deadline without prescribing a
2 penalty for failure to meet the deadline. However, the doctrine of directory statutes resolves
3 the issue.

4 Where a statute includes an arbitrary time limit, one “designed. . . to promote the
5 proper, orderly, and prompt conduct of business,” the statute is considered directory. 82
6 C.J.S. Statutes § 497. Directory statutes contain “no negative words restraining the doing
7 of the act after the time specified.” *Id.* “Thus, where a statute directs that certain
8 proceedings be done in a certain way or at a certain time, the law normally will be regarded
9 as directory, and proceedings under it will be held valid even though the requirements of
10 the statute as to form and time have not been strictly obeyed since the time and manner
11 are not of the essence of the thing required to be done.” *Id.*

12 Nevada courts have not yet addressed directory statutes. But, “[t]he rule in California
13 and the majority of United States jurisdictions is that when a consequence is [not]
14 enunciated for failing to comply with an act on a given date, that date is deemed to be
15 jurisdictionally. . . directory.” *Ward v. Fremont Unified Sch. Dist.*, 80 Cal. Rptr. 815, 821
16 (Cal. App. 1st Dist. 1969). Section 533.370 appears designed to promote order and proper
17 conduct by the State Engineer. The statute prescribes no penalty to the State Engineer
18 when the 1-year deadline is not met. And, being directory, proceedings should be held
19 valid even when form is not strictly obeyed. The directory nature of the statute is confirmed
20 by subsection (4), imposing no penalty on the State Engineer if a decision has not yet been
21 rendered after one year.

22 The State Engineer reached a decision past the 1-year deadline with no penalty
23 imposed upon, or sustained by him. Therefore, while he did not issue Ruling 6126 within
24 the one-year period established in Nev. Rev. Stat. § 533.370(2), subsection (4) establishes
25 that the application remained active until he issued a ruling. The Court finds that this issue
26 is insufficient to warrant the relief requested by the Big Ditch Water Co.

1 Additionally, the Big Ditch Water Co. claims that the State Engineer abused his
2 discretion both by not holding a hearing and by not making various findings before
3 approving Application 79102. After receiving a protest to a published application, “[t]he
4 State Engineer shall consider the protest, and may, in his or her discretion, hold hearings
5 and require the filing of such evidence as the State Engineer may deem necessary to a full
6 understanding of the rights involved. . . [giving notice] at least 15 days before the date set
7 for the hearing.” Nev. Rev. Stat. § 533.365(3) (Jul. 1, 2007) (current version at Nev. Rev.
8 Stat. § 533.365(4), effective July 1, 2011).

9 The Big Ditch Water Co. attempts to limit the statute, which establishes protest
10 hearings as a purely discretionary practice for the State Engineer, to coincide with notions
11 of “fairness” under Due Process. It cites *Revert v. Ray*, 95 Nev. 782 (1979), where the
12 State Engineer had already engaged in an administrative hearing with applicants that had
13 claimed a specific water right. The State Engineer arrived at a ruling without addressing a
14 specific claim made by the applicants, instead relying on a “post-review brief” to justify his
15 decision. The Nevada Supreme Court remanded that issue for further consideration. The
16 Big Ditch Water Co. claims that the remand for a “full and fair determination of the. . .
17 claim” should signify an infringement of Due Process rights when anything less occurs.

18 In contrast, the State Engineer contends that this reading of *Revert* is incorrect; the
19 Nevada Supreme Court’s holding is not “for the proposition that if someone wants an
20 administrative hearing they get it.” The State Engineer argues his actions do not amount to
21 a denial of due process because in not calling an administrative hearing, he exercised
22 statutorily-outlined discretion.

23 In *I.N.S. v. Rios-Pineda*, 471 U.S. 444 (1985), the Supreme Court examined the line
24 between holding discretionary administrative hearings and when denying those hearings
25 may constitute an abuse of that discretion. The Board of Immigration Appeals, headed by
26 the Attorney General, received discretionary power to reopen immigration cases. *Id.* at 449.

1 Respondents, seeking suspension of a deportation ruling, brought suit for abuse of
2 discretion when the Attorney General denied their motion to reopen their case. *Id.* The
3 Supreme Court held that even though the Respondents had met minimum established
4 requirements to have their case reexamined, the discretionary power of the Attorney
5 General controlled. *Id.* at 450. The Attorney General's broad discretionary power in
6 granting administrative proceedings was again confirmed in *I.N.S. v. Doherty*, 502 U.S.
7 314, 324 (1992). Similarly, the Ninth Circuit has stated that, "only a showing of the clearest
8 abuse of discretion can sustain an exception," to the discretion afforded empowered
9 administrative bodies. *Reese Sales Co. v. Hardin*, 458 F.2d 183, 186 (9th Cir. 1972).

10 Here, §533.365(3) plainly establishes the State Engineer's decision to hold any
11 protest hearings is discretionary. As such, barring the "clearest abuse of [that] discretion,"
12 the statute permits the State Engineer alone to determine when protest hearings are
13 granted. The Big Ditch Water Co. does not present any evidence suggesting the "clearest"
14 abuse required to validate such a claim. Without a showing of the "clearest abuse of
15 discretion," the Court finds that this issue does not warrant the relief requested by the Big
16 Ditch Water Co.

17
18 The Big Ditch Water Co. states that the sum of multiple "abuse[s] of discretion"
19 amounts to a denial of due process, warranting relief from the State Engineer's ruling.
20 Nevada water law views water rights as a real property interest. *Application of Filippini*, 202
21 P.2d 535, 537 (1949). Real property interests are subject to a due process analysis, as
22 outlined in *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Big Ditch Water Co. further
23 cites *Goldberg v. Kelly*, 397 U.S. 254 (1970), asserting that, "parties have a due process
24 right to confront evidence offered against them in administrative hearings." Under this
25 analysis, the Big Ditch Water Co. asserts that any possible "loss of delivery time of Big
26 Ditch water [by current water right holders, in consequence of approving more Meadow

1 Ditch water to run into Big Ditch, as the Schulers seek] is a loss of a property right.” Thus,
2 because Big Ditch Water Co. had “no official opportunity” to respond before the State
3 Engineer issued Ruling 6126, it concludes that third-parties may be erroneously deprived of
4 water rights.

5 In response, the State Engineer again cites the two investigations of the State
6 Engineer, and the determination that “Big Ditch has the excess capacity to carry the water
7 rights in Application No. 79102.” The investigations showed that current right holders
8 “would not be harmed” from more water moving through Big Ditch.

9 “The extent to which procedural due process must be afforded the recipient is
10 influenced by the extent to which he may be ‘condemned to suffer grievous loss,’”
11 *Goldberg*, 397 U.S. at 262-63. Despite Ruling 6126, the Schulers have not gained access
12 to Big Ditch, nor has the State Engineer forced Big Ditch Water Co. into surrendering
13 control of Big Ditch. Further, “resolution of the issue whether the administrative procedures
14 provided here are constitutionally sufficient requires analysis of the governmental and
15 private interests that are affected.” *Mathews*, 424 U.S. at 334. The record cites no private
16 interest of the Big Ditch Water Co. that has been affected, no erroneous deprivation has
17 occurred, and the State Engineer has merely fulfilled his statutorily defined duties.

18 The Supreme Court in *Edwards v. Balisok* examined a similar claim of a due
19 process violation by a prisoner who lost good-time credit for various “prison infractions.”
20 520 U.S. 641, 643 (1997). The prisoner asserted multiple abuses of discretion by the
21 administrative hearing officer who deprived him of his good-time credits. The Court stated
22 that if the administrative hearing’s processes were faulty, it could necessarily imply that the
23 judgment rendered was incorrect. *Id.* However, the Court also distinguished that “[the
24 plaintiff’s] claim posited that the procedures were wrong, but not necessarily that the result
25 was.” *Id.* at 645. Despite the prisoner’s claim of a violation of due process, the Court stated
26 that there was no “reason to believe. . . that using the wrong procedures necessarily

1 vitiated the denial of good-time credits.” *Id.* at 646. Because the claim only addressed
2 incorrect procedures, the Court denied the prisoner’s due process claim, and upheld the
3 denial of good-time credits. *Id.* at 648.

4 Here, similar to the prisoner in *Edwards*, the Big Ditch Water Co. claims a denial of
5 due process in Ruling 6126, making multiple claims that the State Engineer erred in his
6 duties and abused his discretion. They claim this abuse of discretion constitutes a due
7 process violation, suggesting a faulty decision on Ruling 6126. As in *Edwards*, the Big
8 Ditch Water Co. suggests that the sum of errors should invalidate the rendered judgment.
9 However, the Big Ditch Water Co. has not argued that the rendered judgment is otherwise
10 unreachable without further review.

11 As in *Edwards*, only when the charges alleged of the administrative officer would
12 necessarily imply the invalidity of their ruling, is it appropriate to conclude that the issued
13 administrative decision should be vacated and re-heard. Minor procedural discrepancies
14 do not invalidate administrative decisions when the decisions reach otherwise legitimate
15 results. In *Edwards* the Court upheld the officer’s ruling, because the prisoner did not
16 question the validity of the judgment and only the means by which it was rendered, even
17 despite accusations of an abuse of discretion. Here, the Big Ditch Water Co. does not
18 directly question the validity of Ruling 6126. They only request further hearings and
19 evidence, confident that such will lead to a different decision by the State Engineer. The
20 State Engineer maintains that his office reached the appropriate decision based on studies
21 conducted and timely filed documents. The Big Ditch Water Co. questions only the means
22 and methods used by the State Engineer in rendering his decision. Similar to the Supreme
23 Court’s language in *Edwards*, there is no reason to believe that the means used or not
24 used by the State Engineer invalidates Ruling 6126.


25 The State Engineer did not deny due process to the Big Ditch Water Co. in issuing
26 Ruling 6126. The Court will not vacate the ruling on the basis of this claim.

III. Conclusion

For the reasons stated above,

THE COURT HEREBY ORDERS that the Big Ditch Water Company's Petition (#1)
for Judicial Review of State Engineer's Ruling No. 6126 is DENIED.

DATED this 26 day of September, 2013.



Lloyd D. George
United States District Judge